

CR 2024/10 - InvoCare Limited - scheme of arrangement and special dividend



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Status: **legally binding**

Class Ruling

InvoCare Limited – scheme of arrangement and special dividend

❶ Relying on this Ruling

This publication is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the income tax consequences of the Special Dividend paid and the Scheme of Arrangement under which Eternal Aus BidCo Pty Ltd (BidCo) acquired all the issued capital of InvoCare Limited (InvoCare) which was not already held by funds managed or advised by TPG Capital Asia (TPG) (together, the TPG Entities).
2. Details of this scheme are set out in paragraphs 46 to 72 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you were an InvoCare shareholder who:
 - held your InvoCare shares on 8 November 2023 (Special Dividend Record Date) and 17 November 2023 (Scheme Record Date)
 - held your InvoCare shares on capital account – that is, your InvoCare shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)), and
 - received the Special Dividend.

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5. This Ruling does not apply to you if you:
- are BidCo or a TPG Entity (including Blue Eternal Holdings Pte. Ltd)
 - acquired your InvoCare shares before 20 September 1985 for capital gains tax (CGT) purposes
 - acquired your InvoCare shares pursuant to an employee share scheme under Division 83A
 - together with your associates, hold or are entitled to acquire, 10% or more of the shares of InvoCare
 - previously applied roll-over relief in connection with the acquisition of your InvoCare shares
 - are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 46 to 72 of this Ruling, or
 - are subject to the investment manager regime in Subdivision 842-I in respect to your InvoCare shares.

Note: Division 230 will not apply to individuals unless they have made an election for it to apply.

When this Ruling applies

6. This Ruling applies from 1 July 2023 to 30 June 2024.

Ruling

Special Dividend

7. The Special Dividend is a 'dividend' as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).
8. The Special Dividend is a frankable distribution under section 202-40.

Assessability of the Special Dividend, franking credits and tax offsets

Resident shareholders

9. If you are a resident of Australia as defined in subsection 6(1) of the ITAA 1936, you are required to include the Special Dividend in your assessable income (subparagraph 44(1)(a)(i) of the ITAA 1936).
10. If you satisfy the residency requirements in section 207-75, you include the franking credits in your assessable income, and you are entitled to a tax offset equal to the amount of those credits (section 207-20), provided you are a 'qualified person' as defined in Division 1A of former Part IIIA of the ITAA 1936.
11. If you received the Special Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership and you are not a corporate tax entity, the franking credits on the Special Dividend are included in your assessable income, provided you are a 'qualified person' (subsection 207-35(1)).

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12. If you are a beneficiary of a trust or a partner in a partnership, and the Special Dividend flows indirectly through the trust or partnership to you, you include your share of the Special Dividend in your assessable income and you are entitled to a tax offset equal to your share of the franking credits on the Special Dividend, provided both you and the trust or partnership (as relevant) are each a 'qualified person' (section 207-45 of the ITAA 1997 and former subsection 160APHU(1) of the ITAA 1936).

13. The franking credit tax offset is refundable, subject to the refundable tax offset rules in Division 67.

14. You are specifically excluded from the operation of the refundable tax offset rules under section 67-25 if you are a:

- non-complying superannuation fund or non-complying approved deposit fund (subsection 67-25(1A))
- trustee of a trust who is liable to be assessed under sections 98 or 99A of the ITAA 1936 (subsection 67-25(1B)), or
- corporate tax entity, unless you are an exempt institution that is eligible for a refund, or a life insurance company that has received distributions on membership interests which were not held by you on behalf of your shareholders (subsections 67-25(1C) and (1D)).

15. Division 63 sets out the rules on how, and in what order, tax offsets are applied against an income tax liability. Where a tax offset that is subject to the refundable tax offset rules in Division 67 exceeds your income tax liability, you are entitled to a refund of the difference (table item 40 of section 63-10).

Non-resident shareholders

Special Dividend attributable to a permanent establishment in Australia

16. If you are a non-resident and the Special Dividend is attributable to a permanent establishment in Australia, you include the Special Dividend in your assessable income (paragraph 44(1)(c) of the ITAA 1936) and you are not liable to pay withholding tax in respect of the Special Dividend (subsection 128B(3E) of the ITAA 1936).

17. If you are also a 'qualified person' (as defined in Division 1A of former Part IIIAA of the ITAA 1936), you include the amount of the franking credits on the Special Dividend in your assessable income and you are entitled to a tax offset equal to the amount of those franking credits (section 207-20 and subsection 207-75(2)).

18. The franking credit tax offset is not refundable (subsection 67-25(1DA)).

Special Dividend not attributable to a permanent establishment in Australia

19. If you are a non-resident and the Special Dividend is not attributable to a permanent establishment in Australia, the Special Dividend is not included in your assessable income (section 128D of the ITAA 1936) and you are not liable to withholding tax in respect of the Special Dividend (paragraph 128B(3)(ga) of the ITAA 1936).

20. The franking credits on the Special Dividend are also not included in your assessable income and you are not entitled to a tax offset for those franking credits (sections 207-20 and 207-70).

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Qualified persons

21. You will be a qualified person in relation to the Special Dividend if, during the period from 23 September 2023 to 16 November 2023 (inclusive), you held your InvoCare shares 'at risk' for a continuous period of at least 45 days¹ during which you did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of the shares. This is because:

- The Special Dividend you received constitutes a 'related payment' for the purposes of former section 160APHN of the ITAA 1936 and therefore the secondary qualification period applies.
- The secondary qualification period is the period beginning 45 days before, and ending 45 days after, the day on which a share became ex-dividend (former section 160APHD of the ITAA 1936).
- The shares became ex-dividend on 7 November 2023, being the day before 8 November 2023 – which was the last day on which acquisition by a person would entitle them to receive the Special Dividend (former subsection 160APHE(1) of the ITAA 1936).
- Any days you had a materially diminished risk of loss or opportunity for gain in respect of the shares are excluded (former subsection 160APHO(3) of the ITAA 1936). Under the Scheme of Arrangement, you no longer held your InvoCare shares at risk on the Scheme Record Date, being 17 November 2023 (when you became committed to dispose of your InvoCare shares under the Scheme of Arrangement).

22. You will need to determine whether you satisfy the holding period rule having regard to your circumstances. This will require taking into account any positions entered into that have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) in respect of your InvoCare shares.

23. The small shareholder exception in former section 160APHT of the ITAA 1936 does not apply as the dividend is a 'related payment' for the purposes of paragraph 207-145(1)(a) and former section 160APHN of the ITAA 1936 (former subsection 160APHT(2) of the ITAA 1936).

24. This means if you are an individual with total franking tax offsets less than \$5,000 for the 2023–24 income year you must still satisfy the holding period rule in relation to the Special Dividend.

Exempting and former exempting entity

25. InvoCare was not an exempting entity (section 208-20) but was a 'former exempting entity' (section 709-160) for the purposes of Division 208 when the Special Dividend was paid. However, as no exempting credits were allocated to the Special Dividend, Division 208 does not apply to it.

26. Therefore, section 208-195 will not apply to deny the inclusion of the amount of the franking credit on the Special Dividend you received in your assessable income, nor to deny the franking credit tax offset to which you are otherwise entitled, under Division 207.

¹ This does not include the day on which your InvoCare shares were acquired or the day of disposal.

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Section 177EA of the ITAA 1936

27. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

Section 204-30

28. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

Capital gains tax consequences**CGT event A1**

29. CGT event A1 happened on 24 November 2023 (Scheme Implementation Date) when you disposed of each of your InvoCare shares to BidCo (section 104-10).

Capital proceeds

30. The capital proceeds for the InvoCare shares for which you received Cash Consideration is \$12.10 per share (paragraph 116-20(1)(a)).

31. The capital proceeds for the InvoCare shares for which you received Scrip Consideration is the market value of the Eternal Aus HoldCo Ltd (HoldCo) shares you received at the time of CGT event A1 (paragraph 116-20(1)(b)).

32. The Special Dividend of \$0.60 per InvoCare share is not included in the capital proceeds.

Capital gain or capital loss

33. You made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of your InvoCare share exceed its cost base (subsection 104-10(4)). The capital gain is the difference.

34. You made a capital loss from CGT event A1 happening if the capital proceeds from the disposal of your InvoCare share is less than its reduced cost base (subsection 104-10(4)). The capital loss is the difference.

35. If you were a non-resident or the trustee of a foreign trust (for CGT purposes as defined in subsection 995-1(1)) just before CGT event A1 happened to your InvoCare share on 24 November 2023, you disregard any capital gain or capital loss you made as a result of CGT event A1 happening if your InvoCare shares were not taxable Australian property for the purposes of section 855-10 unless:

- you have used your InvoCare shares at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- you are an individual and your InvoCare shares were covered by subsection 104-165(3) (choosing to disregard a capital gain or capital loss on ceasing to be an Australian-resident) (table item 5 of section 855-15).

Status: **legally binding**

Discount capital gain

36. If you made a capital gain from the disposal of your InvoCare share, you are entitled to treat the capital gain as a 'discount capital gain' provided you acquired, or are taken to have acquired, your InvoCare share on or before 23 November 2022 and the conditions in Division 115 are satisfied (subsection 115-25(1)).

Availability of scrip for scrip CGT roll-over if a capital gain is made

37. Unless specified otherwise in paragraphs 38 and 39 of this Ruling, you may choose scrip for scrip roll-over for the capital gain resulting from disposing of your InvoCare shares for Scrip Consideration (paragraph 124-780(3)(d)).

38. If you are a non-resident, you cannot choose scrip for scrip roll-over unless the replacement HoldCo shares qualify as 'taxable Australian property' immediately after acquisition (subsection 124-795(1)).

39. Scrip for scrip roll-over is not available if any capital gain from the replacement HoldCo shares would be disregarded, except due to a roll-over (subsection 124-795(2)).

Consequences if you choose scrip for scrip roll-over

40. Where scrip for scrip roll-over is available to you (see paragraphs 37 to 39 of this Ruling) and you choose to apply it, the capital gain you made from CGT event A1 happening in respect of the disposal of your InvoCare shares is disregarded to the extent that you received replacement HoldCo shares (subsection 124-785(1)).

41. The first element of the cost base and reduced cost base of each replacement HoldCo share is worked out by reasonably attributing to it the cost base and reduced cost base (respectively) of your original InvoCare share for which it was exchanged (subsections 124-785(2) and (4)).

42. For the purposes of determining eligibility to make a 'discount capital gain', the HoldCo shares acquired in exchange for the InvoCare share are taken to have been acquired on the date you acquired, for CGT purposes, the corresponding InvoCare share (table item 2(a) of subsection 115-30(1)).

Consequences if you do not choose, or cannot choose, scrip for scrip roll-over

43. If you do not, or cannot, choose scrip for scrip roll-over, you must take into account any capital gain or capital loss from CGT event A1 happening on the disposal of your InvoCare shares when working out your net capital gain or net capital loss for the income year (sections 102-5 and 102-10).

44. If you do not, or cannot, choose scrip for scrip roll-over, the first element of the cost base and reduced cost base of a replacement HoldCo share that you received is worked out by reasonably attributing the market value of the InvoCare share² you gave in respect of acquiring the HoldCo share (paragraph 110-25(2)(b) and subsection 110-55(2)).

45. If you do not, or cannot, choose scrip for scrip roll-over, you are taken to have acquired your HoldCo share on the Scheme Implementation Date (24 November 2023) (paragraph 104-35(5)(c) and table item 2 of section 109-10).

² At the time of acquisition of the HoldCo share.

Status: **legally binding**

Scheme

46. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

47. Other information referenced is the Scheme Implementation Deed (SID) released on the Australian Securities Exchange (ASX) on 9 August 2023 and the Scheme Booklet released on the ASX on 25 September 2023.

Background

InvoCare Limited

48. InvoCare is an Australian-incorporated company that operates Australian, New Zealand and Singapore funeral services, cemeteries and crematoria businesses, overseeing an extensive network of cemeteries, memorial parks and cremators.

49. InvoCare is the head company of an income tax consolidated group and was listed on the ASX until the business day immediately following the Scheme Implementation Date.

50. As of 8 November 2023, InvoCare had 144,060,733 ordinary shares on issue and no other classes of shares or rights on issue.

Eternal Aus BidCo Pty Ltd

51. BidCo is an Australian-incorporated company and a subsidiary of HoldCo.

52. HoldCo is an Australian-incorporated company, an Australian-resident for income tax purposes and is the head company of an income tax consolidated group of which BidCo is a member.

53. HoldCo is the ultimate holding company (as defined in subsection 124-780(7)) of a wholly owned group (the HoldCo wholly owned Group) (as defined in section 975-500), of which BidCo is also a member.

54. Immediately after the Scheme Implementation Date, HoldCo only has Class A and Class B shares on issue.

55. Class A shares are held by Blue Eternal Holdings Pte. Ltd and TPG Asia VIII SPV GP LLC (or their affiliates).

56. The TPG Entities had a combined relevant interest in 27,623,729 InvoCare shares (representing approximately 19.2% of InvoCare's issued ordinary shares) on 9 August 2023.

Scheme of arrangement

57. On 9 August 2023, InvoCare and TPG announced they had entered into a SID under which BidCo agreed to acquire the ordinary shares in InvoCare that were not currently held by the TPG Entities by way of a scheme of arrangement under Part 5.1 of the *Corporations Act 2001*, subject to shareholder and court approval.

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58. Under the terms of the SID, InvoCare shareholders could elect to have Cash Consideration, Scrip Consideration or a mixture of Cash and Scrip (collectively referred to as Scheme Consideration)³. However, they would receive only Cash Consideration if:

- they were Ineligible Foreign Shareholders (as defined in the SID)
- they became shareholders after the date of this election, or
- the election they made was invalid.

59. The Cash Consideration documented in the SID was \$12.70 per share reduced to the extent that any Special Dividend was paid.

60. The Scrip Consideration was Class B shares in HoldCo, the number of which was determined based on \$12.70 per InvoCare share less the amount of any Special Dividend.

61. The Scrip Consideration was issued by HoldCo to a custodian company that held the Class B shares on bare trust for the shareholders who elected to receive Scrip Consideration. Under the terms of the custodian agreement, a shareholder who received Scrip Consideration was:

- absolutely entitled to beneficial ownership of the Class B shares in HoldCo issued as Scrip Consideration and held by the custodian as bare trustee on their behalf, and
- entitled to the economic benefits associated with the Class B shares in HoldCo.

Shareholder meeting and implementation

62. At the shareholder meeting on 31 October 2023, InvoCare's shareholders approved the scheme of arrangement.

63. On 3 November 2023, the Federal Court of Australia approved the scheme of arrangement and provided orders under Part 5.1 of the *Corporations Act 2001*.

64. Entitlement to the Scheme Consideration for InvoCare shareholders occurred on 17 November 2023 (Scheme Record Date).

65. The transfer of InvoCare shares to BidCo under the scheme of arrangement occurred on 24 November 2023 (Scheme Implementation Date).

66. This resulted in InvoCare becoming a wholly owned subsidiary of BidCo and joining the HoldCo tax consolidated group. The shares in InvoCare were then delisted from the ASX at the close of trading on 27 November 2023.

Special Dividend

67. On 16 November 2023, InvoCare paid a fully franked Special Dividend of \$0.60 per share. Entitlements to the Special Dividend was determined on 8 November 2023 (Special Dividend Record Date).

68. The payment of the Special Dividend reduced the Cash Consideration to \$12.10 per share and resulted in the Scrip Consideration being 12.1 Class B HoldCo shares per share.

³ The shareholder could elect to have 75% Cash Consideration, 50% Cash Consideration, 25% Cash Consideration or elect for a certain number of shares to receive Cash Consideration (with the remaining to be provided as Scrip Consideration).

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69. The Special Dividend was:

- sourced from retained earnings
- funded from existing debt facilities
- not funded, directly or indirectly, by BidCo, any TPG Entities or their associates
- compliant with the requirements of *Corporations Act 2001* including section 254T of that Act, and
- fully franked.

70. No proceeds from an equity issue by BidCo, any TPG Entities or their associates has been or will be applied towards the repayment of any portion of the debt incurred to pay the Special Dividend.

71. Neither BidCo, any TPG Entities or their associates had any influence or control over the determination and payment of the Special Dividend. The decision to pay the Special Dividend was entirely at the discretion of the InvoCare Board.

Key dates

72. The following table is a summary of the key dates for the scheme of arrangement and the Special Dividend:

Table 1: Summary of key dates

Date	Event
9 August 2023	Scheme Implementation Deed executed
22 September 2023	First Court Hearing
25 September 2023	Scheme Booklet registered with ASIC
31 October 2023	Scheme Meeting
3 November 2023	Scheme approval at Second Court Hearing
3 November 2023	Effective Date
8 November 2023	Special Dividend Record Date
16 November 2023	Special Dividend Payment Date
17 November 2023	Scheme Record Date
24 November 2023	Scheme Implementation Date

Status: **legally binding**

Other matters

73. This Ruling is made on the basis that:
- HoldCo did not make a choice under subsection 124-795(4) that InvoCare shareholders could not obtain roll-over under Subdivision 124-M.
 - No member of the HoldCo wholly owned Group issued equity (other than the replacement interest) or owes new debt under the arrangement
 - to an entity that is not a member of the HoldCo wholly owned Group, and
 - in relation to the issuing of the replacement interest.
 - There was no 'significant stakeholder' or 'common stakeholder' in InvoCare within the meaning of those terms in section 124-783.
 - All parties that participated in the scheme dealt at arm's length for the purposes of subsection 124-780(4).

Commissioner of Taxation

21 February 2024

Status: **not legally binding**

References

Legislative references:

- ITAA 1936 6(1)
 - ITAA 1936 44(1)(a)(i)
 - ITAA 1936 44(1)(c)
 - ITAA 1936 128B(3)(ga)
 - ITAA 1936 128B(3E)
 - ITAA 1936 128D
 - ITAA 1936 former Pt IIIAA Div 1A
 - ITAA 1936 former 160APHD
 - ITAA 1936 former 160APHE(1)
 - ITAA 1936 former 160APHM
 - ITAA 1936 former 160APHN
 - ITAA 1936 former 160APHO(3)
 - ITAA 1936 former 160APHT
 - ITAA 1936 former 160APHT(2)
 - ITAA 1936 former 160APHU(1)
 - ITAA 1936 177EA
 - ITAA 1936 177EA(5)(b)
 - ITAA 1997 Div 63
 - ITAA 1997 63-10
 - ITAA 1997 Div 67
 - ITAA 1997 67-25
 - ITAA 1997 67-25(1A)
 - ITAA 1997 67-25(1B)
 - ITAA 1997 67-25(1C)
 - ITAA 1997 67-25(1D)
 - ITAA 1997 67-25(1DA)
 - ITAA 1997 Div 83A
 - ITAA 1997 102-5
 - ITAA 1997 102-10
 - ITAA 1997 104-10
 - ITAA 1997 104-10(4)
 - ITAA 1997 104-35(5)(c)
 - ITAA 1997 104-165(3)
 - ITAA 1997 109-10
 - ITAA 1997 110-25(2)(b)
 - ITAA 1997 110-55(2)
 - ITAA 1997 Div 115
 - ITAA 1997 115-25(1)
 - ITAA 1997 115-30(1)
 - ITAA 1997 116-20(1)(a)
 - ITAA 1997 116-20(1)(b)
 - ITAA 1997 Subdiv 124-M
 - ITAA 1997 124-780(3)(d)
 - ITAA 1997 124-780(4)
 - ITAA 1997 124-780(7)
 - ITAA 1997 124-783
 - ITAA 1997 124-785(1)
 - ITAA 1997 124-785(1)
 - ITAA 1997 124-785(2)
 - ITAA 1997 124-785(4)
 - ITAA 1997 124-795(1)
 - ITAA 1997 124-795(2)
 - ITAA 1997 124-795(4)
 - ITAA 1997 202-40
 - ITAA 1997 204-30
 - ITAA 1997 204-30(3)(c)
 - ITAA 1997 Div 207
 - ITAA 1997 207-20
 - ITAA 1997 207-35(1)
 - ITAA 1997 207-45
 - ITAA 1997 207-70
 - ITAA 1997 207-75
 - ITAA 1997 207-75(2)
 - ITAA 1997 207-145(1)(a)
 - ITAA 1997 Div 208
 - ITAA 1997 208-20
 - ITAA 1997 208-195
 - ITAA 1997 Div 230
 - ITAA 1997 709-160
 - ITAA 1997 Subdiv 842-I
 - ITAA 1997 855-10
 - ITAA 1997 855-15
 - ITAA 1997 975-500
 - ITAA 1997 977-50
 - ITAA 1997 995-1(1)
 - Corporations Act 2001 Pt 5.1
 - Corporations Act 2001 254T
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ATO references

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